Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ANTHONY ROSS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE DISTRICT COURT ERRED WHEN IT OVERRULED THE ACCUSED'S OBJECTION TO THE GOVERNMENT'S SUBMISSION OF A DELIBERATE IGNORANCE INSTRUCTION THAT NEGATIVELY IMPACTED THE ACCUSED'S CASE, THUS DENYING HIM A FAIR TRIAL?

II

WHETHER THE GOVERNMENT IMPROPERLY ELICITED EVIDENCE THAT THE ACCUSED HAD INTENTIONALLY ENGAGED IN BANKRUPTCY FRAUD AND UTILIZED THIS EVIDENCE AS IMPROPER *RULE 404(B)* EVIDENCE, THUS DENYING HIM A FAIR TRIAL?

III

WHETHER EVIDENCE FINDING THE ACCUSED GUILTY BEYOND A REASONABLE DOUBT WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE CONVICTION OF BANK FRAUD?

IV

WHETHER DUE PROCESS WAS DENIED WHEN THE FACTUAL DETERMINATION WAS MADE THAT THE INTENDED LOSS EXCEEDED THE ACTUAL LOSS WHICH RESULTED IN THE COURT IMPOSING AN ENHANCED SENTENCE?

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Anthony Ross, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States District Court for the Northern District of Ohio, which judgment became final on September 21, 2007, when the Sixth Circuit Court of Appeals affirmed the lower Court's decisions. The time for the seasonable filing of this Petition was extended, by order of this Court, to February 18, 2008.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals, against which this Petition is directed, was issued on September 21, 2007. This Opinion is included herein, as **Appendix "A," p. 1a**. This Court's extended order is: **Appendix "B," at p. 22a**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked under **Title 28 U.S.C., §1257(3)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved are:

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE AND FACTS

The facts of this case are straightforward. Petitioner, Anthony Ross, on October 25, 2002, received and deposited, one check made payable to him in the amount of $90,000.00, at First Merit Bank into a business account maintained in the name of E.A.R. Investors. This check, drawn on a Bank of New York account maintained in the name of Associates Credit Card Services. Anthony Ross received $5,000.00 after negotiating a check made payable to himself from his business account. One October 28, 2002, Anthony Ross also negotiated a check in the amount of $8,000.00 from said account.

In July, 2003, Anthony Ross deposited a $5,000.00 counterfeit Bank of America check in the name of Anthony Ross, dba Northshore Realty. The check was returned as counterfeit but was never cashed. At a later point in July, 2004, a counterfeit U.S. Treasury Check in the amount of Seven Hundred Thousand Dollars ($700,000.00) was mailed to National City Bank, and one of its employees had deposited this check in the account of Anthony H. Ross, Corp. The evidence showed that Anthony Ross spoke with one of the managers of National City Bank, who acknowledged that Mr. Ross had discussed a wire transfer and whether it was revocable or not. At this point, Mr. Ross made out several cashier's checks to a number of individuals and other entities.

During the period of these transactions, which gave rise to the charges herein, evidence was developed during the trial that in 2001 Anthony Ross met an individual by the name of Didi Duke in Washington,

DC at a real estate convention. Anthony Ross testified that Didi Duke wanted to invest in the northern part of Ohio as part of a $12.5 million investment project. **(tr., p. 572.)** A contract was later negotiated and signed by Anthony Ross and Didi Duke. After the contract was signed, it was agreed that a $90,000.00 due diligence check would be sent to him by mail. **(Ibid.)**

Approximately a year later, Didi Hasan contacted Anthony Ross to discuss the real estate deal in hopes that the project could get off the ground again. **(Id., p. 584.)** Anthony Ross and Did Hasan had numerous email transmissions regarding the future transactions which lead to the ill-fated transaction at National City Bank. During the interim, Anthony Ross received a $346,000.00 check from an auto dealership in Chicago, Illinois. Mr. Ross received this check in the month of July 2003. **(id., p. 599.)**

Despite the Government's insistence there was "deliberate ignorance" by Petitioner, this same individual investigated the origin of the check to see if it was in fact legitimate. The check was sent by Anthony Ross to the fraud investigator of National City Bank, during the period of the investigation of the counterfeit checks presented to National City Bank. The defense also showed that Ace Financial was a shell and Mr. Ross received an email form Ace Financial, and a telephone call from Vanessa Speaks, asking did Anthony Ross receive a wire transfer **(tr., p. 580.)** This evidence was not contradicted by the Government in their presentation of the evidence in their case.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

On appeal, Ross raised five assignments of error. First, he claimed that the District Court erred by giving Sixth Circuit Pattern Jury Instruction, **2.09**, Deliberate Ignorance, to the jury. Second, he claimed the government improperly introduced **Evidence Rule 404(b)** evidence of bankruptcy fraud by Ross. His third claim was that there was insufficient evidence to support a conviction as to Court 1. A fourth claim was there was insufficient evidence to support a conviction as to Count 2, whereas the fifth claim was the District Court erred in calculating Ross' adjusted offense level because it used the amount of the intended loss, rather than actual losses resulting from the offenses.

Petitioner, Anthony Ross, was convicted of Bank Fraud charges in violation of **Title 18, United States Code, §1344**. The Government's case was prefaced on the fact that he "intended" to defraud two financial institutions. However, the evidence adduced in his trial demonstratively showed that he was an unwitting victim who has been scammed by Nigerians. Actually, Anthony Ross never engaged in any acts to conceal any of the monies taken by him from the counterfeit checks.

Simply put, the Government was permitted to use improper evidence **404(b)** evidence as character evidence without any limiting instruction. Hence, the jury was free to utilize accusations of Bankruptcy fraud as proof that his previous actions were in

conformance with this current behavior that lead to these charges.

Next, the District Court improperly instructed the Jury on "Deliberate Ignorance," although there was no factual basis for this instruction. And, lastly, the Trial Court used the "intended loss calculations" in determining the Appellant's guideline range, although the facts, as adduced in trial, showed that the "intended loss" should be zero, thus requiring the Court to use the "actual loss" as the standard for calculating the Appellant's Offense Level. Therefore, the Trial Court inappropriately sentenced the Appellant at the incorrect Offense Level.

ARGUMENT NO. I

THE DISTRICT COURT ERRED WHEN IT OVERRULED THE ACCUSED'S OBJECTION TO THE GOVERNMENT'S SUBMISSION OF A DELIBERATE IGNORANCE INSTRUCTION, THUS NEGATIVELY IMPACTING THE ACCUSED'S CASE AND DENYING HIM A FAIR TRIAL.

The Government submitted a proposed jury instruction of Deliberate Ignorance, which the Trial Court allowed although there was absolutely no evidence supporting this theory of conviction. In the case **United States v. Mari, 47 F.3d 782 (1995),** the Sixth Circuit supported the proposition that its pattern jury instruction on Deliberate Ignorance should be applied only when there is sufficient evidence to support a finding of Deliberate Ignorance

beyond a reasonable doubt. Moreover, the Sixth Circuit admonished district courts from giving this instruction indiscriminately.

In the case **United States v. Lara Velasquez, 919 F.2d 946 (5th Cir. 1990),** the Court held that the Deliberate Ignorance instruction should only be given when (1) the Defendant was subjectively aware of the high probability of the existence of illegal conduct; and (2) the Defendant purposely contrived to avoid learning of the illegal conduct. **Id., p. 951**. See also **United States v. Alvarado, 838 F.2d 311 (9th Cir. 1987)**; and **United States v. Beckett, 724 F. 2d 855 (9th Cir. 1984)**. In this case, the Government could not show that (1) the Defendant was "subjectively aware" of illegal conduct, nor (2) the Defendant "purposely contrived" avoiding illegal conduct.

Undeniably, the instruction given in our factual scenario, a jury might misunderstand the instruction and convict the Appellant based on what he should have known rather than on what he did now. And "thereby relieving the Government of its constitutional obligation to prove the Defendant's knowledge beyond a reasonable doubt." See **United States v. Barnhart, 979 F.2d 647, 652 (8th Cir. 1992)**. See also **United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1977)**.

In fact, in the case **United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991)**, the Court recognized the insuperable fact that instructing the jury on deliberate ignorance is "rarely appropriate." This follows because it is rare for the Government to present evidence that a Defendant

deliberately avoided knowledge of a matter. Here, the Government never presented any evidence as to the transaction of the $900,000.00 check that the accused had knowledge, or some reason to expect that Didi Duke would have delivered him a counterfeit check. The testimony given by Anthony Ross, which was uncontroverted by the Government, was that the $90,000.00 check was given to him as due diligence fees. (**tr., p. 528**). The Government could not, and did not, challenge this version of the circumstances of the first transaction. The question then become how does this jury instruction of Deliberate Ignorance apply in this instance?

With regard to the transactions at National City Bank, these counterfeit checks were deposited in Anthony Ross' account. According to the defense evidence, Anthony Ross was dealing with Didi Hasan, a different investor, who had disassociated him himself from the earlier counterfeit check at First Merit Bank. The Record clearly showed that Anthony Ross had received numerous email transmissions from Didi Hasan, other business entities and individuals connected with these entities, regarding the proposed real estate transactions that caused money to be deposited in Anthony Ross' accounts.

In fact, the Government, through its evidence, was unable to show that Anthony Ross knew that the $700,000.00 credit to his account was not a wire transfer. This was clearly supported by the evidence presented in this case. Even this is not all. A National City Bank employee deposited the $700,000.00 counterfeit Treasury check in the business account of Anthony Ross, with his prior approval and knowledge.

Likewise, it is further clear that there was no evidence that Anthony Ross was deliberately ignorant regarding the circumstances, of this transaction.

There was further uncontroverted evidence that Anthony Ross received a $346,000.00 check. Here, again, in which he checked the validity of the check with the drawer of the check and never deposited this check in his account. In the wake of this evidence, how could the Government realistically request and obtain a deliberate ignorance instruction in this context?

ARGUMENT NO. II

THE GOVERNMENT IMPROPERLY ELICITED EVIDENCE THAT THE ACCUSED HAD INTENTIONALLY ENGAGED IN BANKRUPTCY FRAUD AND UTILIZED THIS EVIDENCE AS IMPROPER *RULE 404(B)* EVIDENCE, THUS DENYING HIM A FAIR TRIAL.

The Government proffered evidence that the Defendant had intentionally and purposely failed to disclose the listing of all of his creditors in violation of the Bankruptcy laws. Moreover, the Government insinuated that the Defendant had deliberately misstated figures regarding his debts, liabilities, and other related issues connected with his Bankruptcy. Here, down below are the relevant segments of testimony where the Assistant U.S. Attorney cross-examined the Appellant regarding his alleged Bankruptcy Fraud:

Q: Okay. Now, when you were talking about the bankruptcy petition yesterday, I believe you testified that in preparing to file bankruptcy, your attorney, the bankruptcy attorney, told you to [give] him a list of all your debts, friends, family, any debt that you had, because it all had to go into this bankruptcy petition. Is that correct?

A: Yes.

Q: But you didn't give him all of your debts, did you?

MR. WATSON: Objection. May we approach?

***

MR. WATSON: You're using his bankruptcy petition right there. It's in your hand. You're alleging he committed bankruptcy fraud.

MR. KERN: I am not.

THE COURT: I'm going to allow the question.

MR. KERN: Okay. Note my objection.

THE COURT: We have your objection.

(Proceedings had in open court:)

BY MR. KERN:

Q: Mr. Ross, you filed this bankruptcy petition. In fact, yesterday when you were in here, you told us that your attorney told you to give him a list of all of your debts.

A: All of my personal creditors. I filed a personal bankruptcy.

Q: In fact, you told us yesterday, and I think almost a direct quote was, "All of your debts. Friends, family, everything, put them on the list. I need to know everything."

MR. WATSON: Objection. That wasn't his testimony.

A: Do you recall that, Mr. Ross? Yes or no?

THE WITNESS: Answer the question?

THE COURT: Yes. You can answer the question.

A: Yes.

Q: Do you recall saying that?

A: Yes.

Q: Okay. And, in fact, you gave Mr. Frankel a long list of creditors.

A: Yes, I did.

Q: Some were secured with mortgages, some were unsecured. There was a whole - - in fact, there is over $1.3 million worth of creditors listed on your bankruptcy. Correct, Mr. Ross?

A: Yes.

Q: You had health care bills that you owed, you had storage fees for your boat, credit card bills. All of those things were listed on there, right?

A: all my personal debt was listed in that bankruptcy.

Q: Okay. And in fact, you even listed Brandon Bromley as a creditor in your bankruptcy, did you not?

A: Yes, I did.

Q: As you described him this morning, he was like a brother to you.

A: Yes, I did.

Q: And in fact, you listed his debt not at $15,000, your bankruptcy petition lists his debt as $55,000. Isn't that right?

MR. WATSON: Objection, Your Honor.

THE COURT: No. I think he can answer that; if he remembers.

Q: Isn't it true that you listed Brandon Bromley at $55,000?

A: Brandon Bromley was suing me personally, and I listed him at the amount the lawsuit was.

Q: Okay. But this document is indicating that you're telling the Court this is what your debt is.

A: My personal debt.

Q: Right. And you told the bankruptcy court - -

MR. WATSON: Objection.

Q: - - that your debt was $55,000 to Mr. Bromley, not 15, didn't you?

MR. WATSON: I'm going to object at that point because he is mischaracterizing that purpose with regard to bankruptcy schedules.

THE COURT: Well, I think he's explained it by saying

> that Mr. Bromley was suing him for $55,000, and that was what he listed, rather than the 15. You can move on, Mr. Kern.

Tr., pp. 616-617 and **622-623.** It is clear that this evidence was not relevant under favor of **Rule 401, Federal Rules of Criminal Procedure**. But even if it were relevant, its probative value was substantially outweighed by undue prejudice. See **Rule 403**.

In **United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996),** the Sixth Circuit Court of Appeals held that where a defendant objects to the introduction of extraneous acts testimony, the prosecution must state the specific purpose for which the extraneous acts evidence was being offered. Also see, **United States v. Lattiner, 385 F.3d 947 (6th Cir. 2004).** If the Court permits the Government to introduce evidence of other crimes, a limiting instruction should be given to the jury. Without the limiting instruction, the jury was free to use this other acts evidence as substantive proof of the Defendant's guilt. Rule **404(b),** actually forbids what was done here; *i.e.*, the introduction of evidence regarding other crimes and the like when the purpose was to show the character of an accused and to show that he acted in conformity with that character in committing the acts charged in this case then on trial.

It is worth emphasizing that the Appellant was victimized by these rulings made by the Court. These rulings enabled counsel-opposite to impermissibly

develop that the Appellant intentionally violated Bankruptcy laws, and had engaged in deceptive tactics against unsuspecting creditors.

Here, the law is clear. Before evidence of this ilk is admitted the Court must first determine whether its probative value is outweighed by the dangers of unfair prejudice and confusion of the issues and the like. The Court must, in fact, invariably charge the jury with the limited basis for the admission of such evidence. And, they must explicitly considered for the very limited purpose for which it was admitted. See **United States v. Ailstock, 546 F.2d 1285 (6th Circ. 1976).**

In our judgment, there was a violation of **Rule 404(b).** Clearly, the Government introduced evidence of other crimes to show the character of the accused and to show that he acted in conformity with that character in committing the acts alluded to by the Government.

ARGUMENT NO. III

EVIDENCE FINDING THE ACCUSED GUILTY BEYOND A REASONABLE DOUBT WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT ANY CONVICTION OF BANK FRAUD.

The Government failed to prove the accused guilty of two counts of Bank fraud, in violation of **Title 18, United States Code, §1344.** It is uncontroverted by the testimony of Anthony Ross who was beguiled by a Nigerian scam to deposit a $90,000.00 into his business account. Agent Henderhan confirmed that

the email transmissions were in fact genuine and that the source (information) of the email transmissions made came from out of the country and could not be traced. (**tr., pp. 456-457**). In fact, the defense produced evidence through the testimony of Anthony Ross that showed that there was a proposed transfer of $12.5 million for a real estate project. (**Id., p. 528**) Email transmission, **Exhibits "A," " B," & "C,"** fully illustrated this point (Also see **Testimony of Anthony Ross, Tr., pp. 542-544**).

Significant here, on appeal it was indeed, argued the government through its evidence could not refute the defense's claim that the accused had no knowledge that the check deposited in his account was a counterfeit check. In fact, the accused, Anthony Ross, had not concealed or engaged in any evasive tactics to avoid dealing with any individual including, but not limited to Mary Ezelle of First Merit Bank, a Government witness. In her testimony she testified that Anthony Ross was cooperative and was trying through his current projects to repay the Bank for the loss as the result of the counterfeit check deposited in his account, in which he withdrew funds in the amount of $13,000.00 (**tr., p. 127**) the evidence showed that through this deposit of the counterfeit check a loss of $10,000.00 (**Id., p. 148**).

Likewise, the Government has absolutely no proof to show that Anthony Ross had actual knowledge with the intent to defraud National City Bank with a counterfeit United States Treasury Check in the amount of $700,000.00. The evidence adduced during the trial showed that the accused, Anthony Ross, believed that the monies were deposited in his account

as the result of a wire transfer from a company in Illinois. Stephanie Bonzar a Government witness, testified that she had spoke with Deanna Armstrong and her understanding was that the funds credited to H. Anthony Ross account by means of a wire transfer. **(Tr., p. 219)**. This belief of Petitioner was also supported by the email transmission s before, during and after the confirmation of the deposit.

Even this is not all. The counterfeit Treasury check that was deposited by a National City Bank employee by the name of Patricia R. DiFrancesco. It was her testimony that she mistakenly believed that the check was deposited into an account that was not Anthony Ross', but a different corporation that has large deposits all the time. **(Id., p. 220.)** A hold was never placed on the check because of this particular customer. **(Id., p. 223.)** The Government cannot refute the factual assertion that Anthony Ross had absolutely no knowledge of the deposit of a counterfeit Treasury check. In fact, the Government, through the investigation, could not trace the deposit of this counterfeit check which that was mailed from Pennsylvania to Anthony Ross, or his company (Northshore Realty), or to any one of his employees.

Further proof that Anthony Ross thought that future monies came through a wire transfer was shown by the email transmissions between he and Didi Hasan. See **Defendant's Exhibits W, X, & Y (Apx. Vol. 2, pp. 931-984).** The email transmission referenced in **Government Exhibits 47, 48, 49 & 50 Defendant's Exhibit HH**, all confirm Anthony Ross' understanding that the funds were wired into Ross' account.

Indeed, even after National City Bank discovered that the Treasury check was counterfeit, Anthony Ross made significant cooperative efforts in retrieving the cashier's checks and voluntarily offered to agree to a payment plan in order to repay the money. Here is a segment of Anthony Ross' testimony, illustrating out point:

A: Yes. I do believe that's when Linda Urban and I began communicating.

Q: Were you able to provide any documents that you had to National City Bank?

A: I provided to them email transmission from Mr. Hasan. I informed him who I wrote the cashier's checks out to.

Q: And that would be with both the branch manager, as well and Linda Urban; is that correct?

A: Yes, yes.

Q: And Mr. Ross, did the bank give you an inclination on what they were going to do about his situation?

A: The bank just wanted their money back. I retrieved one of the cashier's checks form Lorain County courthouse, and overnighted that bank to Linda Urban. And I requested that if I could go on some type of payment plan, I wanted to - - I told her that, no I could not pay $60,000, but I can pay

anywhere from two to $5,000 a month until this situation is resolved.

Q: Who did you make that proposal to?

A: I made that proposal to Linda Urban.

Q: And when did you make that proposal to her?

A: I made that proposal, it had to have been somewhere around the second or third contact.

Q: Okay. And you were told that it was unacceptable?

A: She was told that - - I was told that she couldn't - - she did not have the authority to take any payments, but whatever type of money you can send, send it, and that's when I retrieved the Lorain County court check. And she told me that - - she actually told me that she wanted all funds in her office by December 15th.

Q: And that was the deadline you were given?

Tr., p. 592-593.

ARGUMENT NO. IV

DUE PROCESS WAS DENIED WHEN THE FACTUAL DETERMINATION WAS MADE THAT THE INTENDED LOSS EXCEEDED THE ACTUAL LOSS WHICH RESULTED IN THE COURT IMPOSING AN ENHANCED SENTENCE.

The United States District Court failed to make the proper factual determinations regarding whether the intended loss exceeded the actual loss to the victims. In fact, the Court simply accepted the probation Department's calculation of the accused's Offense Level, as well as the jury's guilty verdicts. Here, it what the trial Court stated:

> THE COURT: It seems that the jury heard the evidence, and the jury made up their minds as to what is credible. That's why we have the guilty verdict on both counts. So at this point, I think that the Offense Level of 21 is an accurate calculation furnished by the probation office and Criminal History Category is I. The guidelines indicate a period of 37 to 46 months.

Sentencing Tr., p. 15. Here, it is significant that according to the evidence adduced during trial, it was abundantly clear from the evidence that the intended loss of the crimes in which the accused was convicted

of was zero. The Record was replete with testimony from Government witnesses, namely Deanna Armstrong, Anna Klepek, Linda Urban, and Mary Ezelle, that Anthony Ross attempted to repay or recoup the Bank for losses suffered from the counterfeit checks that were negotiated at both First Merit and National City Banks.

In determining the Offense Level computation, §2B1.1, of the Sentencing Guidelines explains how to calculate losses arising form counterfeiting offenses. Also, the commentary of §2B1.1 says that "loss is the greater of actual loss or intended loss." **United States Sentencing Guideline, §2B1.1, cmt. n. 3(A).** The Court, in calculating the intended loss, as compared to the actual loss, must have support in the Record by a preponderance of the evidence. See **United States v. Moored, 38 F.3d 1419 (6th Cir. 1994)**, and **United States v. Smith, 951 F.2d 1164 (10th Dir. 1991)**.

This counsel was left with the impression that it was constrained by the jury's verdict as to the determination of intended loss. The guilty verdicts in this case is only dispositive in determining that the Appellant was guilty of Bank Fraud. And the Court had to make its own factual determination of whether the intended loss was greater than the actual loss. In our view, the overwhelming evidence on this point, showed that the Appellant had not intended to cause a loss to the financial institutions in which the counterfeit checks were drawn on.

CONCLUSION

Regarding the issue of loss, the sufficiency of evidence, and the **404(b)** issue, it is obvious that certain legal arguments are simply unavailing to the Government, to rebut out specific contentions made in this Brief.

It is our view, at least, that the Appellant's convictions should be reversed. But, it is our belief that the Government failed to prove sufficient evidence for a finding of guilt on both counts.

For all of these reasons this cause should be reviewed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 05-4469

[September 21, 2007]

United States of America, Plaintiff-Appellee,	)
v.	)
Anthony H. Ross, Defendant-Appellant.	)

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 04-00611—Ann Aldrich, District Judge.

Before: MARTIN, BATCHELDER, and CLAY, Circuit Judges.

MARTIN, J., delivered the opinion of the court, in which CLAY, J., joined. BATCHELDER, J. (p. 9), delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Defendant Anthony H. Ross appeals his conviction on two counts of bank fraud in violation of 18 U.S.C. § 1344. Defendant challenges (1) the deliberate ignorance jury instruction given by the district court, (2) the government's questioning of defendant regarding his personal bankruptcy petition, (3) the sufficiency of the evidence supporting his conviction, and (4) the district court's finding that the intended loss from the bank fraud scheme totaled $634,300, resulting in a sentence enhancement. For the reasons that follow, we find the district court did not abuse its discretion in giving a deliberate ignorance instruction or in overruling Ross's objection to the government's cross-examination regarding his personal bankruptcy petition, and that the evidence was sufficient to support both convictions for bank fraud. We find, however, that the district court's determination of intended loss at sentencing was in error. Accordingly, we AFFIRM defendant's conviction, VACATE his sentence, and REMAND for resentencing.

I.

1. The Nigerian Counterfeit Check Scam

Defendant Anthony Ross is a residential and commercial real estate broker in Lorain County, Ohio. Ross has been in real estate for approximately twenty years. After graduating from high school, Ross joined the Navy, where he became involved in real estate part time. After receiving an honorable discharge in 1993, Ross became a real estate agent in Lorain County. In

1997, after working as an agent for Realty One for several years, Ross obtained his broker's license and opened his own business, Northshore Realty. At the time of trial, Northshore Realty had eight full-time employees and seven affiliated independent agents. In 2001, Ross became a Certified Commercial Industrial Management (CCIM) specialist, a designation of some renown in real estate, which allowed him to conduct commercial real estate transactions. During his time as an agent in Lorain County, Ross was involved with the Lorain County Board of Realtors and in 2001 was elected its president.

When Ross opened Northshore Realty, he planned to develop and sell houses to low-income residents of Lorain County. Ross created E.A.R. Investors, Inc., which was a general contracting business affiliated with Northshore Realty for the express purpose of building low-income houses. Ross obtained financing through FirstMerit Bank and also from family and friends who invested between $15,000 and $20,000 in the project. Between 2001 and 2002, Ross sold 18 of these homes. Unfortunately, he was never able to return a profit on them, and suffered a financial loss. Throughout 2002, FirstMerit repeatedly reminded Ross to make timely payments on his credit line. In 2003, FirstMerit foreclosed on his credit line and Ross was unable to repay the loans he obtained from his family and friends. Also in 2003, Ross filed for personal bankruptcy, though his businesses remained intact.

It was during these financial difficulties that Ross met a potential commercial real estate investor. In 2001, Ross was attending a National Realtors'

Association convention in Washington, D.C. where he met an individual by the name of Didi Duke. Duke and Ross agreed to develop commercial real estate in Lorain County. Duke offered to gather approximately $12.5 million in investment capital for the proposed project. Upon his return from the conference, Ross memorialized his agreement with Duke in a contract to represent Duke and a "group of investors in a development or an investment of about $12.5 million." Ross and Duke corresponded several times over the phone before agreeing to enter into this contract, and Ross had his attorney review the contract prior to signing it. Testimony at trial did not, however, provide any insight into the specifics of this alleged commercial real estate transaction other than $12.5 million was to be invested in commercial real estate projects in Lorain County, Ohio.

According to Ross's testimony, after the contract was signed, Duke mailed a $90,000 due diligence check to him. Ross received this check via overnight mail on October 25, 2002. The check was drawn on an Associates Credit Card Services Account with the Bank of New York. The check itself appears to be printed on a British Petroleum check. Upon receipt of this $90,000 check, Ross quickly went to a FirstMerit branch in Oakwood (nearest his office) to deposit it and to get $5,000 cash back. The branch informed him a hold would be placed on a check of that size and he would be unable to receive funds from the check until after the check cleared. Ross then decided to take the check to the FirstMerit branch in Sheffield (nearest his home) because "they [knew him] over there." At the Sheffield branch, Ross was able to gain approval from the manager to deposit the check in his E.A.R.

Investors account and to receive $5,000 back. Ross needed the $5,000 in order to make payroll at one of his low-income housing construction sites. A few days later, on October 28, 2002, Ross withdrew another $8,000 from the E.A.R. Investors account in order to have cash for a trip he was taking with his girlfriend (now wife) to New Orleans.

While in New Orleans, Ross's bank card and credit card from FirstMerit were frozen and he was unable to withdraw funds. Ross spoke with an official from the bank who informed him that the $90,000 check he had deposited was counterfeit. Upon his return from New Orleans, Ross contacted Duke to inquire about the counterfeit check. Duke informed Ross that his investors were no longer interested in investing in the United States after the events of 9/11 and had backed out of the transaction. Ross's accounts at FirstMerit remained frozen through the time of trial. Ross's financial difficulties subsequently proved too much to bear, and he filed for personal bankruptcy under Chapter 7 of the Bankruptcy Code on April 18, 2003. Ross was discharged from his bankruptcy on July 29, 2003.

During the summer of 2003, several months after the failed transaction with Duke, Ross was contacted by an individual named Didi Hassan. From May 2003 until sometime in the fall of that year, there were several email and telephonic communications between Ross and Hassan discussing the resurrection of the transaction originally arranged with Duke. Hassan led Ross to believe an individual by the name of Bello from Canada was arranging financing for the deal. Ross spoke with Bello on the phone and provided his

personal information for purposes of securing financing.

In June 2003, Ross received via overnight mail a check for $346,990.60 drawn on the account of Gregory Dodge Hyundai Car Dealership in Highland Park, Illinois. Ross believed this check was from Mr. Bello and that Gregory Dodge Hyundai was an investor in the proposed real estate deal. Ross called Gregory Dodge Hyundai to confirm they were actually investors in the deal and discovered the check was counterfeit. Ross mailed the counterfeit check to Gregory Dodge Hyundai at their request.

A few days later, Ross received a Bank of America cashier's check for $5,000. Ross deposited this check in his FirstMerit account, believing it to be money sent from Hassan for the purposes of opening up an offshore account to facilitate the proposed deal. After depositing the check, Ross was contacted by the bank and informed the check was counterfeit. Because Ross had not withdrawn any funds from the check, the bank suffered no loss. Ross informed the bank he was dealing with Nigerians who were interested in investing in Lorain County. Ross shared several emails between himself and Hassan with the bank investigator. The bank investigator informed Ross that this was likely a scam and to stop dealing with Hassan or any other Nigerians. Ross promised to cut off his dealings with Hassan.

From August 2003 until May 2004 there was a break in the email communication between Ross and Hassan. No evidence was presented as to why this break occurred other than Ross's own testimony that

he was ignoring Hassan because he was angry about the counterfeit checks.

In the summer of 2004, Hassan contacted Ross again in an attempt to revive the deal with new financing. Hoping to prevent any future counterfeit checks, Ross informed Hassan that he would only accept payment by wire transfer from a United States bank. Hassan agreed to a wire transfer and initiated negotiations with Ace Financial, allegedly based in Chicago, to secure financing in the amount of $700,000. In June of 2004, Ross emailed Hassan stating that he had been contacted by the Chicago financiers about the loan and that the disbursement would occur within seven to ten business days.

On July 15, 2004, National City Bank received an envelope containing a United States Treasury Check for $700,000 payable to A.H. Ross Corp. The account number for A.H. Ross Corp. was typed on the endorsement line on the back of the check. Upon receipt of the check, National City immediately deposited the check in the A.H. Ross Corporation account. No hold was placed on the check as Treasury checks are considered guaranteed funds. At this time, Ross was out of town. When he returned to town on Monday, July 19, 2004, Ross was greeted with an email from Hassan asking if the funds had been credited to his account and a phone call and fax from Ace Financial in Chicago stating that the funds had been disbursed to his account at National City in the amount of $700,000. Ross testified that he believed the money to have been wired into his account.

Over the next three days, Ross purchased several cashier's checks from the bank in order to pay off debts owed to friends and family. He also moved $505,000 into an investment account at Edward Jones which he had opened approximately a month earlier. Within days, the Treasury check was returned to National City as counterfeit. Thanks to its own quick actions and the cooperation of Ross, National City was able to recover all but $60,824.

Upon learning that the funds were from a check rather than a wire, Ross immediately contacted Hassan and Ace Financial. At some point in the summer of 2004, the phone number for Ace Financial was cut off and Hassan stopped communicating with Ross. At this time, Ross had been in contact with the bank investigator and had attempted to negotiate a payment plan to pay back the money lost by the bank, but the bank turned down his request and referred the case for prosecution.

In November 2004, United States Secret Service agents showed up unannounced at Ross's office. One of the agents told Ross they were investigating a Nigerian counterfeit check scam of which Ross may have been a victim. Believing the agents were there to help him, Ross happily discussed all of his dealings with Duke and Hassan in detail. This meeting lasted several hours in a conference room in Ross's office. At some point during this meeting, Ross deduced that *he* was the actual suspect. The agents informed Ross of his *Miranda* rights and Ross subsequently agreed to offer a written statement. In his testimony and his written statement, Ross revealed that at some point after receiving the first counterfeit check, he

researched Nigerian scams on the internet. After that research, Ross insisted that all transactions be done by wire transfer between United States banks and received assurances from Hassan that he and his associates were not part of any scam. Additionally, his written statement said that he was aware through his dealings with Duke and Hassan that they were likely attempting to scam him, but he wanted to "get them before they got me." He also stated that his "business dealing should have been cut off. Greed got the better of me." Finally, he said in his written statement that he had no idea who sent the $700,000 Treasury check.

On December 15, 2004, a federal grand jury in Cleveland, Ohio, returned an indictment charging Ross with two counts of Bank Fraud, in violation of 18 U.S.C. § 1344. The first count related to the $90,000 counterfeit check passed at FirstMerit, and the second count related to the $700,000 check deposited at National City. On July 18, 2005, a jury found Ross guilty of both counts of bank fraud. On October 20, 2005, Ross was sentenced to 37 months incarceration, followed by four years of supervised release.

2. District Court's Determination of Intended Loss At Sentencing

At Ross's sentencing hearing, the district court adopted the findings of the probation officer that the actual loss resulting from Ross's bank fraud was $71,648.86 and that the intended loss was $634,300.00.

In computing his sentence, the district court determined that the Sentencing Guideline for violation

of 18 U.S.C. § 1344 calls for a Base Offense Level of 7. The district court also found that pursuant to U.S. S.G. § 2B1.1(b)(1)(H) the offense level should be increased by 14 because the loss was between $400,000 and $1,000,000. The district court stated it was constrained by the definition of "loss" contained in Application Note 3 to U.S.S.G. § 2B1.1(b)(1), which states that "loss is the greater of actual loss or intended loss." Ross objected to the intended loss amount of $634,300 but the district court overruled his objection stating only that a jury found Ross guilty on both counts of bank fraud for passing two counterfeit checks totaling $790,000.

The district court found that Ross had a Total Offense Level of 21; because Ross had no prior convictions, he was placed in Criminal History Category I. The guidelines range for that Offense Level and Criminal History Category is 37 to 46 months. The district court sentenced Ross to 37 months imprisonment and four years of supervised release. The district court noted this was at the low end of the guidelines range.

II.

1. Deliberate Ignorance Instruction

This Court reviews a district court's choice of jury instructions for abuse of discretion. *United States v. Prince*, 214 F.3d 740, 761 (6th Cir. 2000). A trial court has broad discretion in crafting jury instructions and does not abuse its discretion unless the jury charge "fails accurately to reflect the law." *United States v. Layne*, 192 F.3d 556, 574 (6th Cir. 1999) (quoting

United States v. Busacca, 863 F.2d 433, 435 (6th Cir. 1988)). Moreover, no single provision of the jury charge may be viewed in isolation; rather, the charge must be considered as a whole. *United States v. Lee,* 991 F.2d 343, 350 (6th Cir. 1993). A judgment may be reversed based upon an improper jury instruction "'only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.'" *United States v. Harrod,* 168 F.3d 887, 892 (6th Cir. 1999) (quoting *Beard v. Norwegian Caribbean Lines,* 900 F.2d 71, 72-73 (6th Cir. 1990)).

The district court gave the following deliberate ignorance instruction:

> Next I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that Anthony Ross deliberately ignored a high probability that any checks or deposits received from Didi Hassan or any of his associates would be counterfeit or otherwise fraudulent in nature, then you may find that Anthony Ross knew that the $700,000 deposit into his National City Bank account on July 15, 2004 was also fraudulent in nature.
>
> But to find this, you must be convinced beyond a reasonable doubt that Anthony Ross was aware of a high probability that any checks or deposits received from Didi Hassan or any of his associates would be counterfeit or fraudulent in nature, and that Anthony Ross deliberately closed his eyes to what was obvious.

> Carelessness or negligence or foolishness on his part is not the same as knowledge, and is not enough to convict. This, of course, is all for you to decide.

This instruction tracks verbatim with the Sixth Circuit Pattern Instruction 2.09 on deliberate ignorance. It appears the district court only instructed on deliberate ignorance with regard to the second count of bank fraud, i.e. the count relating to the $700,000 Treasury check.

Ross argues that the district court abused its discretion because there was insufficient evidence to support a deliberate ignorance instruction. Ross's argument is largely controlled by *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995). In *Mari*, this Court held that when a district court gives a deliberate ignorance instruction that does not misstate the law but is unsupported by sufficient evidence, it is at most harmless error, so long as there is sufficient evidence of the defendant's actual knowledge to support a conviction. *Id.* The *Mari* Court, relying on the Supreme Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), reasoned that if a jury instruction does not misstate the law, but rather is unsupported by the evidence, the jury's conviction will not be overturned if there is evidence supporting a conviction on another instructed theory. *Id.* at 786. In subsequent cases this Circuit has reaffirmed *Mari*'s reasoning. *See, e.g., United States v. Monus*, 128 F.3d 376, 390-91 (6th Cir. 1997) ("[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance.").

Here, Ross does not argue that the instruction given misstated the law on deliberate ignorance.[1] And, as the government points out, there is sufficient evidence to support a deliberate ignorance instruction on the second count-the only count for which the instruction was given. Over the course of two years, Ross received four counterfeit checks, one of which he found so suspicious that he called the account holder to determine its validity, only to confirm his suspicion that it was a fraud. After the $90,000 check was returned as counterfeit, Ross went so far as to conduct research on Nigerian scams and testified that he believed his deal to be a scam. He even promised National City Bank he would cease all dealings with the Nigerians. This pattern of conduct shows Ross was aware that he might be the target of a scam and that counterfeit checks were part of that scam, yet he continued to accept fraudulent checks. This evidentiary record supports a deliberate ignorance instruction on the second count.

2. Ross's Testimony Regarding His Personal Bankruptcy Petition

During direct examination, Ross testified that he filed a petition for personal bankruptcy under Chapter 7 of the Bankruptcy Code. He testified that "all the loans and people that [he] owed were put into the

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[1] Even if Ross had so argued, the district court strictly adhered to the wording of the Sixth Circuit Pattern Jury Instruction 2.09, which this Court has held accurately states the law of deliberate ignorance. *See e.g., United States v. Beaty*, 245 F.3d 617, 622 (6th Cir. 2001).

bankruptcy...." On cross examination, it was elicited that Ross listed some creditors related to his failed modular housing plan but failed to list others. Ross's redirect testimony explained that these alleged discrepancies were due to the fact that his bankruptcy was personal, and some of his investors had contracts with his businesses and not with him personally.

At trial, Ross's counsel timely objected to the prosecution's cross-examination questions regarding inconsistencies in Ross's bankruptcy petition as improper Rule 404(b) evidence of other crimes, wrongs or acts. Ross's attorney argued that the government was attempting to improperly elicit evidence of bankruptcy fraud. The district court overruled the objection and allowed the line of questioning. Ross now renews this claim on appeal.

"[A] trial judge's evidentiary decisions will not normally be reversed absent a clear showing of abuse of discretion." *United States v. Daniels,* 948 F.2d 1033, 1035 (6th Cir. 1991) (citing *United States v. Hickey,* 917 F.2d 901, 904 (6th Cir. 1990)).

Ross's argument falls flat. During his direct examination he testified that he listed all of his personal creditors, including friends and family, opening the door for exploration of that statement on cross-examination. Accordingly, the government attempted to elicit on cross-examination that Ross had improperly excluded some personal creditors from his bankruptcy while including others. The government is allowed to impeach any statement made by Ross in his direct examination through cross-examination under Federal Rule of Evidence 607 ("The credibility of a

witness may be attacked by any party...."). This was exactly what occurred at trial. The government's questions were intended to impeach Ross's earlier testimony that he had listed all of his creditors and thus were proper under Rule 607. *See Virostek v. Liberty Twp. Police Dep't/Trs.*, 14 Fed. Appx. 493, 506-07 (6th Cir. 2001). Accordingly, we hold that the district court did not abuse its discretion in overruling Ross's objection.

3. Sufficiency of the Evidence

Ross argues on appeal that the evidence was insufficient to support his convictions for bank fraud. When considering such an argument this Court does not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." *United States v. M/G Trans. Servs., Inc.*, 173 F.3d 584, 588-89 (6th Cir. 1999). Our task is to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *and after giving the government the benefit of all inferences that could reasonably be drawn from the testimony,* any rational trier of fact could find the elements of the crime beyond a reasonable doubt." *Id.* at 589 (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)) (emphasis in original). Thus, Ross "bears a very heavy burden" in his sufficiency of the evidence challenge. *United States v. Davis,* 397 F.3d 340, 344 (6th Cir. 2005) (internal citations omitted).

In order to prove a violation of 18 U.S.C. § 1344, the government must prove three elements: "(1) that the defendant knowingly executed or attempt to execute a scheme to defraud a financial institution; (2) that the

defendant did so with the intent to defraud; and (3) that the financial institution was insured by the Federal Deposit Insurance Corporation." *Davis,* 397 F.3d at 344. At issue is whether the government adequately proved beyond a reasonable doubt that Ross had the requisite knowledge required to be convicted of bank fraud under 18 U.S.C. § 1344. In other words, Ross must have "knowingly" participated in a scheme to defraud FirstMerit and National City Bank.

Ross argues that there is no evidence he knew the $90,000 check was counterfeit. He also argues that he believed the $700,000 deposited to his account was via wire transfer and not by check, and thus he had no knowledge a check was even used, let alone a counterfeit check.

As is often the case, direct evidence of knowledge and intent is hard to come by, and thus must be proven by circumstantial evidence. This Circuit has stated that "circumstantial evidence alone is sufficient to sustain a conviction, and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Winkle,* 477 F.3d 407, 413 (6th Cir. 2007) (internal quotation marks and citations omitted).

In the present case, the government offered evidence that over the course of two years Ross passed a counterfeit $90,000 check, received a suspicious and counterfeit $346,000 check in the mail, and deposited a counterfeit $5,000 check. Additionally, during that same period a counterfeit $700,000 Treasury check was mailed to his bank with instructions to be

deposited in his account. The jury also considered more than forty emails between Ross and the "Nigerians" and listened to Ross's own testimony from the witness stand.

Ross presented evidence that he was in contact with investors from overseas and that he believed those investors were legitimate. He also presented evidence that after he received the first three counterfeit checks he became very upset with the overseas investors and required all future transactions be done by wire transfer between United States banks. The evidence also appears to show that he believed the $700,000 that was deposited in his account was a wire transfer and not a Treasury check. Additionally, Ross did not run and hide from the alleged fraud. Instead, Ross attempted to work out a payback program with the bank.

While this case presents a close evidentiary call, we do not believe Ross has met his very heavy burden of showing the evidence was insufficient. The jury chose not to believe Ross's testimony and found that there was enough circumstantial evidence to prove Ross knowingly intended to defraud a bank. The government offered evidence of Ross's motive to commit bank fraud. Ross was in dire financial straits. Ross had filed for personal bankruptcy. Ross needed money to pay his debts and keep his businesses afloat. The government also called into question Ross's meeting with Duke. The Secret Service Agent could find no evidence of a Didi Duke attending the Realtors' conference in Washington, D.C. Ross also admitted to researching Nigerian scams on the internet and that he believed this proposed deal was likely a scam. He

even stated that his greed had got the better of him. And ultimately, Ross did receive four counterfeit checks and deposited three of them. This circumstantial evidence calls into doubt Ross's story that he was simply the victim of an elaborate Nigerian counterfeit check scam. Thus it cannot be said that *no* rational trier of fact could have found beyond a reasonable doubt that Ross knowingly participated in bank fraud.

4. The District Court's Loss Determination at Sentencing

At sentencing, Ross objected to the probation office's presentence report finding that the intended loss from the two counts of bank fraud totaled $634,300. Ross argued the intended loss was zero and that the government failed to prove he intended any loss. The district court rejected Ross's argument and adopted the presentence report's finding that the intended loss was $634,300.

The district court gave the following statement on the record in support of its rejection of Ross's objection to the intended loss amount:

> It seems that the jury heard the evidence, and the jury made up their mind as to what is credible. That's why we have a guilty verdict on both counts. So at this point I think that the total offense level of 21 is an accurate calculation furnished by the probation office....

This Court has held that "Federal Rule of Criminal Procedure 32(i)(3)(B) requires the district court at

sentencing to rule on any disputed portion of the presentence report or other controverted matter." *United States v. White,* 492 F.3d 380, 415 (6th Cir. 2007) (internal quotation marks omitted). Thus, if the defendant raises a dispute to the presentence report, the "court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." *United States v. Solorio,* 337 F.3d 580, 598 (6th Cir. 2003) (internal citations omitted). "Rather, the district court must affirmatively rule on a controverted matter where it could potentially impact the defendant's sentence;" that is, "the district court must *actually find facts,* and it must do so by a preponderance of the evidence." *White,* 492 F.3d at 415-416. We require this literal compliance with Rule 32(i)(3)(B) because it "enhanc[es] the accuracy of the sentence and the clarity of the record." *United States v. Treadway,* 328 F.3d 878, 886 (6th Cir. 2003).

Here, the district court failed to make any factual findings on the record in support of its intended loss calculation. Rather, the district court simply embraced the figures set forth in the presentence report over Ross's objections. "[R]eliance on the [presentence report] is insufficient when the facts are in dispute." *Treadway,* 328 F.3d at 886. Accordingly, we find the district court erred in failing to explain its determination with actual factual findings supported by a preponderance of the evidence that the intended loss amounted to $634,300.

III.

For the foregoing reasons, we AFFIRM the district court's decision to give a deliberate ignorance instruction, AFFIRM the district court's decision to overrule Ross's 404(b) objection, AFFIRM the jury's conviction on both counts of bank fraud, but VACATE Ross's sentence and REMAND for resentencing.

CONCURRING IN PART, DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. I concur in full with the majority's decision to affirm Ross's conviction, but I disagree that the district court violated its duty under Fed. R. Crim. P. 32(i)(3)(B) and, for this reason, dissent from the court's decision to vacate Ross's sentence and remand for resentencing.

Fed. R. Crim. P. 32(i)(3)(B) requires a district court to "rule" on "any disputed portion of the presentence report or other controverted matter." At sentencing, Ross argued that the intended loss should have been zero because he never *intended* a loss with regard to the bank." When presented with this credibility-based (rather than a fact-based) argument, the court reasonably adopted the jury's assessment of Ross's credibility. In doing so, the district court responded to the only issue raised by Ross and thus satisfied its duty to "rule" on this "controverted matter."

This is not a case where the district court "summarily adopt[ed] the factual findings in the presentence report or simply declare[d] that the facts

[were] supported by a preponderance of the evidence." *See United States v. Solorio*, 337 F.3d 580, 598 (6th Cir. 2003). Ross did not contest or ask the court to recalculate the loss figure in the presentence report, but merely argued that he did not intend a loss to the bank. Under these circumstances, the court was under no duty to make an independent loss calculation. The issue before the district court was clear: If Ross intended a loss (i.e., if he sought to defraud the banks), then the loss calculation in the presentence report was correct. If, however, he did not intend a loss (i.e., if he did not seek to defraud the banks), then the loss calculation would be zero. Perhaps, the district court found this argument to be baffling in light of the fact that Ross had been found guilty of bank fraud, one of the elements of which-as the majority opinion correctly explains with regard to Ross's claim of insufficient evidence-is the "intent to defraud." *See also United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001). The court nevertheless addressed Ross's argument, adopted the jury's adverse credibility finding, and sentenced Ross as prescribed in the guidelines. Under these circumstances, that is all Fed. R. Crim. P. 32(i)(3)(B) required.

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 17, 2007

Mr. James R. Willis
The 113 St. Clair Building
113 St. Clair Ave., N.E., Suite 530
Cleveland, OH 44114-1214

Re: Anthony H. Ross
v. United States
Application No. 07A504

Dear Mr. Willis:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 17, 2007 extended the time to and including February 18, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

/s/
Sandy Spagnolo
Case Analyst